**Sutton, Peter, 2003. *Native title in Australia. An ethnographic perspective*. Cambrigde: Cambrigde University Press. ISBN 0 521 81258 5 (hardback). £ 50.00.**

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Native title, the land rights issue, are amongst the more complex constitutional and legal areas in Australia. Peter Sutton, one of the leading experts in this and other fields such as Aboriginal languages and arts, is writing for anthropologists, practitioners and lawyers, for the lay person. He addresses intricate themes of Aboriginal Australia prior to and since colonization from the perspective of him as expert anthropolical witness in Court. He describes in some detail his approach and the book's structure, often giving advice to readers as to what they might wish to read first before they proceed. However, the book is based on a collection of published and unpublished papers and, while Sutton took care to edit them to establish cohesion, there appears to be some overlap that blurs the underlying objectives of each chapter. My review will not be done from the angle of the writer's intended audience but from that of the general Australianist and ignore those parts that I perceive to be somewhat repetitive.

The history of native title is not addressed at length. Native title challenges the *terra nullius* view that the British government adopted at the beginning of colonization and applied unaltered as the colonies expanded in 1825, 1829, 1831 and when in1879 Britain claimed the remaining Torres Strait Islands (cf. p 137). The point of insisting on this fact is that the *terra nullia* position has a rather short history in parts colonized later and hence there was scope for traditional land rights to exist unaffected for longer. The historical background, starting with the re-affirmation of the *terra nullius* doctrine in 1971 to the *Mabo* judgement in 1992, the *Native Title Act* of 1993, its amendment in 1998, etc., are summed up in the Introduction (pp xiv-xv). Following the legal definition of *title*, the principled positions taken by the High Court is surveyed briefly so as to establish a basis for the chapters to follow. Sutton may be seen to structure the book around the definition of Native Title and the requirements necessary, it may be good to begin with the definition and some comments:

> The expression of *native title* or *native title rights and interests* means the communal, group or individual rights and interests of Aboriginal peoples or Torres Stait Islanders in relation to land or waters, where:
>
> (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by Aboriginal peoples or Torres Stait Islanders; and
>
> (b) the Aboriginal peoples or Torres Stait Islanders, by those laws and customs, have a connection with the land or waters; and
>
> (c) the rights and interests are recognised by the common law of Australia.
>
> (underlining mine; *Native Title Act* of 1993; section 223(1), from Sutton (2003:xv))

Underlined passages refer to what rights are; who can claim them or any (including the question of inheritance, loss, and acquisition other than inheritance); who has the right to acknowledge them; and how they can be recognized by Australian law. Since



native title is about the proof of a tradition of rights, the distinction between "'classical' and 'post-classical' social and cultural formations and practices" (p xvii) is an important one and replaces that between *traditional* and *non-traditional* practices. The former relates to formations and practices that seem to be much the same as those that can be reconstructed for the pre-colonial period, the latter relates to have emerged since colonization. The reason for this terminology is that colonization has not, as I said above, affected the entire continent in 1788 and that there has been a level of continuity and cultural transformation that has maintained pre-colonial practices. The terminological distinction and the transformation of all aspects of societies shows up throughout the book and leads to a crucial insight for many Australianists abroad.

Chapter 1, entitled "Kinds of rights in country", starts with the kinds of rights there could be relating to land. Suttons surveys a taxonomy of rights, of how rights are passed on, gained (in, e.g. unoccupied land) or lost. The oppositions or scales between rights vs. privileges, primary vs. secondary (or derivative) rights, actual vs. potential rights and, importantly, core vs. contingent rights seem useful, as are the concepts of 'land as units of tenure' and 'land as units of economic use'. Native title claimants often seek to gain different types of rights and the High Court has worked on the 'bundle of rights' principle so as to do justice to large numbers of claimants rather than to small groups. An important point is that Aboriginal land is 'inalienable' (p 21) – just like, say, the land that carries the name of 'Germany' is inalienable. Another important observation concerns that co-existent rights have emerged between traditional owners and pastoralists since colonization. And, importantly, pastoralism often did not amount to a "direct philosophical assault in Aboriginal cultural traditions" (p 36), which *was* the case with Christian missions.

Chapter 2, "Local organisation before the land claims era", (and various parts of other chapters) place Sutton's positions in the wider research history. Chapter 3, "Aboriginal country groups" continues the theme of social organization (ignored above) and deepens the discussion of who could legally claim title. But it begins with the role of anthropologists in title cases as experts and witnesses, continues with the hierarchies of potential title holders (of various types of rights) and turns to the issue of what must be done to gain a true picture of the situation in light of the fact that there is a lot of variation in even closely related geographical and social areas such as the Cape York peninsula. Worse than that, different names for potential title holders, the fact that names may have changed may make the identification of rightful claimants difficult. It is interesting to refer here to his brief treatment of individuality as a potential factor. He says that "the idea of a private encounter between ungrouped individuals is not easily assimilated to classical Aboriginal views of how such events have meaning" (p 63). Yet, he does show that individualism was not entirely unknown in the Western Desert region, in contrast to the coastal Wik area. As a result (in most cases), it is groups that attract names and identity rather than networks of interaction. And it is groups that have rights to what is called *estates* in anthropology. Estate rights are passed on to individuals in their capacity of members of a group. While rights in land are tied to groups, individual associations with or (types of) rights in a number of estates comes about through a range of cultural practices, marriage patterns, and the

like. More generally, "Ownership", he says, "is not a given, but an accomplishment" (p 82), but it remains unclear if this *accomplishment*, once it was achieved, could ever be (rightfully) challenged. The chapter also contains an extensive discussion of the relationship between language and groups.

Chapter 4, "Atomism versus collectivism", once again starts with advice to practitioners on how to collect relevant background information but deals specifically with the issue of whether there is a regional layer on Aboriginal social organization, a layer above the local one, that negotiate the space between local groups and (non-existent) Australian-wide networks. He strongly argues for such a regional layer and rejects the idea that this was not a feature of classical Aboriginal societies: "The argument that large-scale descision-making, such as that involved in a regional response to a major development proposal, had no place in Aboriginal life ... and cannot be part of Aboriginal tradition can be refuted on two grounds. First, Aboriginal tradition is grounded in, but not bound by, conditions and practices of the pre-colonial past.... Second, large-scale gatherings were typical of ceremonial events in early times" (p 90). This points to one of the central themes of his book, *viz.* that (classical) Aboriginal traditions have not been abolished (with exceptions) but have often transformed into novel responses to the challenges posed by the colonizers – and that these novel responses, to the extent that they have some level of (legal) historicity – must be accepted in native title claims. He shows, by implication, that the 'traditional' contrast between *traditional* and *post-colonial* societies is errorneous in that it overlooks cultural transformations and that it makes sense to speak of classical vs. post-colonial societies, etc. Of course, a regional layer meets numerous problems to do with the (lack of) congruence of regional land tenure systems and regional polities (p 91) and the lack of available data but the concept as such should replace that of *nation* that was in common use for some time and gives greater freedom of local features and does not require structured polities. He discusses other terms such as (various senses of) 'community' etc. in this context.

Chapter 5, "Underlying and proximate customary titles", follows logically and maintains that titles have been maintained (in general) with a high level of robustness (p 111). Given these scenarios, the notion of Law is a central theme; Law derives from "ancestral people of Dreamings and is passed down the generations in a continuous line" (p 113). Sutton goes on to show how land rights emanate from the wider law principles. 'Underlying' or 'immediate' title can be claimed by groups and are about the geographic extension of land, the control of access, etc., while 'proximate title' entails right are overarching rights, emanating from Dreaming, and is associated with regions or neighbourhood tribes. Sutton goes on to discuss aspects of succession, divestment, etc., and comes to an assumed link between language and culture and argues that inguistic expressions allegedly express or, at least, refer to issues of title-hood.

Chapter 6, "The question of system", continues the theme of Law and asks if one can speak of a law system and/or of social practices prior to and since colonization that might bolster up any title claim. Sutton indeed shows that Aboriginal Law and related practices add up to a *system*, which was, however, flexible across the continent and can rarely be put into a single codex of laws. In passing, one might add that different



legal and cultural traditions co-exist happily and develop in European countries – witness the European Court and British common law, new legal areas such as maritime or space law. There is, as he points out, continuity and change – despite of colonization. But again he also shows variation across the continent and asks how much (legal) *fluidity* is sufficient to legally deny the status of 'system of law' (p 140). Once again, the Western Desert seems to stand out with its flexibility, which however does not apply to other regions. "The Western Desert is", he says, "the region that seems to have been in the greatest demographic instability at the time of colonisation" (p 143). While that may be due to 'ecological uncertainties' (*sic*!), he agrees with McConvell that this may reflect the recency of using that land. According to a range of evidence, the move of Desert languages to the east of Hamersley Ranges began less than 3,000 years ago and contact with the Hermansburg region was as recent as 1,000 ago. It thus seems fundamentally flawed to speak of a static society and to expect total stability over thousands of years. The fluidity has continued after colonization with, e.g. fringe dwellers, such as of Darwin, leading 'double lives'. As fringe dwellers and at the time of assimilation and oppression they "played down and actively suppressed their concurrent memberships of fourteen different descent-based stocks affiliated with fourteen different hinterland languages", but "when representing themselves as the Wallaby Cross mob they 'generally submerge original ethnicities and present themselves as a grouping united in what they call 'that Dawin style we got'" (p 147). Given flexibility in relation to region, period of time and habitat, Sutton continues to explore variations in marriage rule systems (as against actions), patrifilial groups, the use of the concept of *corporation* (with a shared purpose) for social units, that of *clan*.

Chapter 7, "Kinship, filiation and Aboriginal land tenure", looks at the role of kinship in forming and maintaining polities. And Chapter 8, "Families of polity", concludes with a discussion of the changes that have been brought about by colonization. In post-classical social organization, the "cognatic groups are not 'extended families' of living people with a role confined to kinship and mutuality ... [but] they are kin groups of enduring and central importance to the conduct of Aboriginal business." (p 210). Such 'families of polity' form a central element of public life. Terms like 'Adelaide Nunga' or 'Brisbane Murri' are linguistic manifestations of this organization.

While I could not write from a legal or lawyer's persepctive, it seems to me that the book may get another dimension if one keeps in the back of one's mind the situation of rights in relation to land and tangible property in Europe and asks what rights 'title-holders' may have, acquire or be given by acts of will or inheritance. It is obvious that (national) land such as Germany is as inalienable as is indigenous land. All rights conveyed to individuals (and their heirs) are framed within this overall right that may and, normally is, relegated to lower-level bodies such as the *Land*, the *Gemeinde*, etc., which establish restrictions on the kind of uses that can be made with a (piece of) land. The (important) gist of the book then is to show that Aboriginal societies reflect much the same structural elements and to highlight the irresponsibility of the *terra nullius* doctrine for so long. Sutton shows the diversity of classical and post-classical patterns and provides insights why Native Title is such a complicated matter in Australia.